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In the Supreme Court of the United States

OCTOBER TERM, 1997

BETH ANN FARAGHER,
Petitioner,

v.

THE CITY OF BOCA RATON, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE* OF NATIONAL WOMEN'S LAW CENTER, EQUAL RIGHTS ADVOCATES and WOMEN'S LEGAL DEFENSE FUND ON BEHALF OF PETITIONER

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BRIEF *AMICI CURIAE* OF NATIONAL WOMEN'S LAW CENTER, EQUAL RIGHTS ADVOCATES and WOMEN'S LEGAL DEFENSE FUND ON BEHALF OF PETITIONER

INTERESTS OF *AMICI CURIAE*

Amici curiae are organizations strongly committed to achieving equality for women, and each has an abiding interest in ensuring the sound interpretation and application of the provisions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, which protect against sexual harassment in the workplace. Descriptions of the individual organizations are set forth in the attached appendix.[1]

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1 The parties' written consent to the filing of this brief has been filed with the Court. No counsel for any party authored this brief in whole or

STATEMENT OF THE CASE

Amici adopt the Petitioner's Statement of the Case for purposes of this brief.

SUMMARY OF ARGUMENT

In this brief, *amici* advocate a standard of employer liability that is supported by agency principles and best comports with the realities of sexual harassment in the workplace. Specifically, this brief argues that agency principles support holding employers liable for sexual harassment where a supervisor invokes the employer's authority, either implicitly or explicitly, to sexually harass subordinate employees. Title VII also mandates holding employers liable for sexual harassment if they have failed to provide a meaningful avenue for complaints of sexual harassment. The existence of a policy prohibiting, and procedures for reporting, sexual harassment alone will not immunize an employer, however, where agency principles still require a finding of liability.

I. INTRODUCTION

As this Court has repeatedly recognized, sexual harassment is a form of sex discrimination that negatively affects women's ability to achieve workplace equality.[2] As the Court stated in *Harris v. Forklift Systems, Inc.*:

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in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

2 *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *see also Franklin v. Gwinnett County Pub.*

> A discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers . . . . [T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender . . . offends Title VII's broad rule of workplace equality.

Id. at 22.

Sexual harassment constitutes precisely the kind of "artificial, arbitrary, and unnecessary barriers to employment" that Title VII was intended to prevent.[3] Title VII "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," including sexual harassment in the workplace. *Harris*, 510 U.S. at 21, (*quoting Meritor*, 477 U.S. at 64). In enacting Title VII, Congress intended to eradicate discrimination from the workplace and made a clear policy decision that the employer is in the best position to prevent discrimination from occurring. *See Horn v. Duke Homes, Inc.*, 755 F.2d 599, 605 (7th Cir. 1985). In addition, Title VII seeks to compensate the victims of discrimination for their injuries by imposing liability on employers for the discriminatory acts of their employees. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

Schs., 503 U.S. 60 (1992) (recognizing sexual harassment of student by teacher as form of unlawful sex discrimination).

3 *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

To make Title VII's promise of workplace equality meaningful, this Court should adopt a standard of employer liability which brings the full protection of the law to bear on sexual harassment in the workplace. In *Meritor*, this Court recommended looking to traditional principles of agency for guidance on the standards for employer liability. *Meritor*, 477 U.S. at 72.

In formulating the standard of employer liability for sexual harassment by a supervisor, the Court should draw on common law agency principles, as set forth in the *Restatement (Second) of Agency*, the public policies underlying Title VII, and the considerable scholarly research available which illuminates the causes and effects of, as well as the proven methods to prevent, sexual harassment in the workplace. This inquiry requires the adoption of a legal standard that holds employers liable when the harasser draws on authority delegated by the employer to sexually harass subordinate employees, or when the employer fails to prevent or respond to sexual harassment.

Specifically, employers should be liable for hostile work environment sexual harassment where (1) a supervisor explicitly or implicitly invokes the employer's authority to sexually harass subordinate employees; or (2) even if the harasser did not act as the employer's agent, the employer knew or should have known of the harassment and failed to take appropriate action. In applying the second principle, an employer should be deemed to have constructive knowledge of the harassment if it failed to develop and disseminate a policy against harassment or failed to provide to all employees a meaningful avenue for complaining of sexual harassment.

The Eleventh Circuit decision below fails to apply these principles properly. Its decision would effectively shield employers from liability for the acts of their supervisors and impose liability only on employers who knew or should have known of the hostile environment, thus treating sexual harassment by a supervisor the same as sexual harassment by co-workers. Even with regard to the "knew or should have known" standard, the court construed notice too narrowly. The court's overly restrictive test is at odds with traditional principles of agency and imputed corporate knowledge. *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1539 (11th Cir. 1997) (Barkett, J., concurring in part and dissenting in part). This brief first discusses traditional agency principles, which, contrary to the Eleventh Circuit's decision, require that the employer be liable in the instant case. The brief then discusses the independent ground for liability where, as here, the employer did not provide a meaningful avenue for redress to harassed employees.

II. EMPLOYERS SHOULD BE LIABLE FOR SEXUAL HARASSMENT WHERE A SUPERVISOR INVOKES THE EMPLOYER'S AUTHORITY, IMPLICITLY OR EXPLICITLY, TO SEXUALLY HARASS SUBORDINATE EMPLOYEES

When a supervisor abuses the day-to-day power over the workplace given to him or her by the employer and sexually harasses subordinate employees, the employer should be liable. Traditional agency principles and Title VII's statutory scheme require that result for all types of sexual harassment cases, whether hostile work environment or *quid pro quo*.

A. Agency Principles Support Holding Employers Liable For The Explicit Or Implicit Use By Supervisors Of Their Authority To Sexually Harass Employees

There is nothing novel about the proposition that employers should be liable for the acts of their supervisory employees. Employers function in the workplace through their supervisors, to whom employers grant broad power over subordinate employees. Employers vest supervisors with significant control over the decisions to hire, fire, promote, discipline, and control the work environment. Supervisors typically assign work to employees, oversee that work, provide and interpret workplace rules, evaluate and report on employee performance, mediate interactions between employees, and grant sick and annual leave and overtime pay. *See Meritor*, 477 U.S. at 76 (Marshall, J., concurring) (a "supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees;" rather, they are "charged with the day-to-day supervision of the work environment . . ."). In short, supervisors are responsible for many of the workplace decisions, both formal and informal, that determine an employee's success and advancement on the job.[4] Because of the control supervisors have over the workplace, sexual harassment by supervisors in the course of supervising employees will rarely occur independent of the

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4 Thus, sexual harassment can exacerbate other impediments to the advancement of women into high level management positions, such as exclusion from training, mentoring relationships, informal networks and other career development opportunities important for employee development. Federal Glass Ceiling Commission, *Good For Business: Making Full Use of the Nation's Human Capital* (1995).

supervisors' authority as agents of the employers. *Meritor*, 477 U.S. at 77.

When supervisors wield the broad authority granted by the employer to sexually harass subordinate employees, they act as agents of the employer. Common law agency principles require imposing liability on employers for the sexual harassment of their supervisors in such cases. The supervisor *is* the employer, and the employer is therefore liable for the acts of the supervisor even if the employer did not have notice of them. Many cases after *Meritor*, which have addressed the issue of employer liability for hostile environment sexual harassment by a supervisor, have relied on Section 219(2)(d) of the *Restatement (Second) of Agency*[5] to hold employers liable for precisely this reason.[6] For example, the Tenth Circuit in *Harrison v. Eddy Potash, Inc.*, held the employer responsible for the discriminatorily abusive hostile work environment created by a supervisor who capitalized on and abused his delegated authority. 112 F.3d at 1446. As the court recognized, the employer was

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5 *Restatement (Second) of Agency* § 219(2)(d) (1958) provides that "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

6 *See, e.g., Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1446 (10th Cir. 1997), *petition for cert. filed* (Aug. 6, 1997); *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557-60 (11th Cir. 1987). *Cf. Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1352 (4th Cir. 1995) (finding employer liable in constructive discharge case because supervisor "used [actual and apparent] authority to accomplish" harassment).

liable, despite having had no notice of the problem, because it had conferred on the supervisor actual and extensive power over his subordinates in the workplace, which the supervisor abused.[7] Thus, the supervisor was "'aided in accomplishing the harassment by the existence of the agency relationship.'"[8]

To hold an employer liable for its supervisors' abuse of delegated authority is also consistent with both the EEOC Guidelines and the EEOC's subsequent Policy Guidance on Sexual Harassment.[9] The EEOC Guidelines, as this Court recognized in *Meritor*, "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[10] The EEOC Guidelines would hold the employer liable for sexual harassment by its supervisors, "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." 29 C.F.R. § 1604.11(c). Relying explicitly on the Restatement, the EEOC Policy Guidance states further that "'an employer also may be liable if the supervisor was aided in accomplishing

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7 The Tenth Circuit also rejected the employer's argument that it should not be liable because it had a system for processing employee complaints in place. *See* discussion *infra* at pp. 24-28.

8 *Harrison*, 112 F.3d. at 1445 (quoting *Karibian v. Columbia Univ.*, 14 F.3d at 780).

9 29 C.F.R. § 1604.11 (1997); EEOC Policy Guidance on Sexual Harassment, 8 F.E.P. Manual (BNA) 405:6681, 6699 (Mar. 19, 1990).

10 *Meritor*, 477 U.S. at 65 (*quoting General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976), *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

the tort by the existence of the agency relation.'" 8 F.E.P. Manual (BNA) at 405:6699, *citing* § 219(2)(d) of the Restatement.

Under the law of agency, where supervisors use the authority of the principal to harass their subordinates, the employer is liable, whether the harasser's use of the employer's authority is express or implied. Because the supervisors' control over the workplace is normally so complete, it is unnecessary that supervisors explicitly invoke their authority to hold the employer liable for the harassment.

Nothing in the Restatement or in the cases relying on it requires that a supervisor's use of actual or apparent authority to harass be explicit. The courts' articulation of the Section 219(2)(d) principle broadly encompasses any use of supervisory authority to harass. In *Torres v. Pisano*, 116 F.3d 625, 635 (2d Cir. 1997), *cert. denied*, 66 U.S.L.W. 3385 (1997), for example, the Second Circuit set forth the principle as follows: "[I]n order to establish liability on the theory that the supervisor exploited the agency relationship in committing the harassment, a plaintiff 'must allege facts which establish a nexus between the supervisory authority' and the harassment." The court noted that "this is not an onerous requirement." 116 F.3d at 635. Most important, the court's discussion of legal authority in support of this principle makes it clear that the supervisor need not make that nexus explicit. For example, the court in *Torres* cited with approval another Second Circuit case which found that a supervisor had used his authority to commit hostile environment sexual harassment, where he convened a business dinner, implied that employees were required to attend, fostered alcohol consumption at the dinner, and then

sexually assaulted the plaintiff.[11] Thus, even an unspoken use of authority by a supervisor to sexually harass a subordinate supports employer liability.

This case illustrates how supervisory authority can be used to facilitate and exacerbate sexual harassment. Supervisors Terry and Silverman were the highest ranking supervisors in the Marine Safety Section, located at a remote worksite far removed from the rest of the city government. They were granted "virtually unchecked authority over the work environment." *Faragher*, 111 F.3d at 1544 (Barkett, J., concurring in part and dissenting in part). As Marine Safety Chief, Terry "had the authority to supervise all aspects of the lifeguards' work assignments, to conduct counseling and oral reprimands and place reports of such disciplinary actions in the lifeguards' personnel files," and to interview and select new lifeguards, "subject to approval by higher management." *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1563-64 (S.D. Fla. 1994), *aff'd in part and rev'd in part*, 76 F.3d 1115 (11th Cir. 1996), *on reh'g, en banc*, 111 F.3d 1530 (11th Cir. 1997). Silverman, as Marine Safety lieutenant, and then captain, supervised the daily workplace environment, including work assignments and staffing of shifts, as well as the lifeguards' physical fitness routines. Together, Terry and Silverman had unfettered authority over the work environment and the supervision of their subordinate employees. *Id.* at 1564.

The sexual harassment of the female employees occurred as an integral part of this supervision. Both Terry

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11 *Torres*, 116 F.3d at 635; *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1306-07 (2d Cir. 1995).

and Silverman relied on their actual and apparent authority to create a hostile environment for Petitioner through offensive touching and remarks in the course of their supervision. Some of their use of authority to sexually harass was explicit, as evidenced by supervisor Terry's interview question to an applicant asking if she was going to "fuck" or "screw" all of the male lifeguards like the rest of the female lifeguards. 864 F. Supp. at 1557. In addition, Terry and Silverman inappropriately touched and made sexually harassing comments to Petitioner and other female lifeguards while supervising them on the job. *Id.* at 1556-58. Terry and Silverman used the authority delegated to them by the City of Boca Raton to create a hostile environment for the female lifeguards who were subordinate to them.

The realities of the workplace are such that a supervisor's sexual harassment of subordinate employees often will be furthered and exacerbated by the supervisor's very authority over the target. Sexual harassment becomes more extreme the greater the power difference between the victim and the harasser, and sexual harassment is more likely to occur when there is an imbalance of power in the workplace.[12] According to a study of Fortune 500 companies, almost two thirds of sexual harassment complaints are brought against a woman's immediate supervisor or another person with greater power.[13]

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12 *See* J. N. Cleveland and M. E. Karst, *Sexual Harassment and Perceptions of Power: An Underarticulated Relationship*, J. of Vocational Behav. at 52 (1993).

13 Ronni Sandroff, *Sexual Harassment in the Fortune 500*, Working Woman at 69, 71 (Dec. 1988).

Women are particularly vulnerable to the abuse of authority by a sexually harassing supervisor because women hold a structurally inferior place in the workforce.[14] Sexual harassment by a supervisor operates in the workplace to reinforce power and to keep women in a subordinate place. Not only does harassment have a direct effect on the working conditions and emotional health of the victim, but it also undermines her work performance and opportunities for advancement in the same way as sex discrimination in hiring, promotion and work conditions. As this Court observed in *Harris v. Forklift Systems, Inc.*, harassing conduct "can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." 510 U.S. at 22.

B. Persons Subjected To Hostile Work Environment Harassment By Supervisors Deserve The Same Level Of Protection As Persons Subjected To Other Forms Of Unlawful Discrimination Under Title VII

Principles developed in a broad range of Title VII cases further support holding employers liable for a hostile environment created by a supervisor who uses authority

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14 Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity and the Shaping of Legal Standard*, 43 Emory L. J. 151, 182-84 (1993). *See also* Matthew S. Hesson-McInnis and Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. Applied Soc. Psychol. 877, 887, 890 (1997) (female employees are more likely to experience sexual harassment in male-dominated workplaces); Barbara Gutek, *Sex and the Workplace* 150-151 (1985) (concluding that in workplace where women are numerically rare, they face even more sexual harassment than other women do).

delegated by the employer to sexually harass subordinate employees. For example, in cases involving *quid pro quo* sexual harassment, courts generally hold employers liable for the supervisor's wrongful conduct because he, "by definition, wields the employer's authority to alter the terms and conditions of employment . . . ."[15] The supervisor may abuse that delegated power either by demanding sexual favors, so-called "*quid pro quo*" harassment, or by creating a harassing "hostile environment." *Meritor*, 477 U.S. at 65-66. We submit that the policy objectives that support employer liability for *quid pro quo* harassment apply equally to hostile environment harassment where harassers use their authority to harass subordinates, implicitly or explicitly.

Modern cases addressing the question of vicarious liability for employers rely less on the distinction between the two types of harassment, and more on the policy objectives to be achieved by imposing liability on the employer. The Second and Tenth Circuits have correctly recognized that agency principles as expressed in Section 219(2)(d) of the

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15 *Karibian*, 14 F.3d at 777. Courts have been virtually unanimous in holding employers strictly liable for *quid pro quo* harassment. *See, e.g., Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 n.3 (4th Cir. 1995); *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 579 (2d Cir. 1989); *Lipsett v. University of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988); *Highlander v. K.F.C. Nat'l Mgt. Co.*, 805 F.2d 644, 649 (6th Cir. 1986); *Horn v. Duke Homes, Inc.*, 755 F.2d 599, 606 (7th Cir. 1985); *Crimm v. Missouri Pac. R.R.*, 750 F.2d 703 (8th Cir. 1984); *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981); *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979); *but see Sims v. Brown & Root Industrial Servs., Inc.*, 78 F.3d 581 (5th Cir.) (affirming district court opinion holding employer liable for *quid pro quo* harassment only where employer had notice of harassment and failed to act), *cert. denied*, 117 S. Ct. 68 (1996). *See also Meritor*, 477 U.S. at 65 (noting with apparent approval EEOC position that *quid pro quo* harassment is properly imputed to employer).

Restatement (Second) of Agency apply equally to hold employers liable in both types of sexual harassment cases, because they involve harassment committed by a supervisor whose power to regulate the workplace environment aids in the accomplishment of the harassment.[16]

Deterrence, risk shifting, and risk spreading are generally cited as the primary policy considerations in the imposition of vicarious liability in *quid pro quo* cases.[17] Holding employers vicariously liable for supervisory harassment creates an incentive for the employer to take the strongest possible measures to prevent the hiring and retention of supervisors who engage in sexual harassment, to adopt policies to discourage harassment, and to properly train employees to avoid sexually harassing behavior. Because employers can often replace an injured employee at little cost, the employer bears little or no financial risk when an employee is sexually harassed, and therefore has little incentive to prevent harassment absent the imposition of employer liability.[18] The consideration of deterrence applies as strongly in hostile environment cases as it does in *quid pro quo* cases. In either situation, the employer is in the best position to prevent the harm from occurring because the

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16 *Harrison*, 112 F.3d at 1443; *Torres*, 116 F.3d at 635.

17 *See, e.g., Horn v. Duke Homes, Inc.*, 755 F.2d at 605 ("Sex discrimination can best be eradicated by enforcing a strict liability rule that ensures compensation for victims and creates an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and retention of sexist supervisors.").

18 David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed By Their Supervisors*, 81 Cornell L. Rev. 66, 92-94 (1989).

employer controls the workplace, selects the supervisor, and determines that supervisor's responsibilities.

Furthermore, forcing the employer to take action to prevent sexual harassment is the most cost-effective way to eliminate harassment in the workplace. As Seventh Circuit Chief Judge Richard Posner explained, "[T]he most efficient method of discouraging sexual harassment may be by creating incentives for the employer to police the conduct of its supervisory employees, and this is done by making the employer liable."[19] The employer controls the workplace and is therefore in the best position to prevent harassment.[20] The employer is also in the best position to bear the cost associated with the prevention of sexual harassment. Indeed, without imposing the cost of prevention on the employer, the victims of harassment will have to bear a disproportionate cost of their injuries.[21]

Moreover, in light of the blurred character of the line separating *quid pro quo* from hostile environment harassment, it would be inappropriate to base the standard of employer liability on any categorization between the two.[22]

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19 Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. Chi. L. Rev. 1311, 1332 (1989).

20 David Oppenheimer, *Exacerbating the Exasperating*, *supra* note 18, at 93.

21 *Id.* at 93-94.

22 *See, e.g., Karibian*, 14 F.3d at 780-81 ("It would be a jarring anomaly to hold that conduct which always renders an employer liable under a quid pro quo theory does not result in liability to the employer when that same conduct . . . is a discriminating abusive work environment"); *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 567 (7th Cir. 1997) (Wood, J., concurring and dissenting) (arguing that because

The two forms of harassment often overlap, and courts frequently analyze cases pursuant to both theories.[23] In *quid pro quo* cases, the harassing supervisors invoke their authority by conditioning the receipt of job benefits on acceptance or rejection of sexual favors. In hostile environment cases, the supervisors use their authority over the workplace to create a sexually hostile environment for subordinate employees. No principled distinction justifies holding employers liable for one and not the other.[24]

"[i]n the real world, sexual harassment does not sort itself into tidy categories," a rule imposing different standards of liability for *quid pro quo* and hostile environment harassment makes "neither legal nor practical sense"), *petitions for cert. filed* (Sept. 29 and Nov. 10, 1997); Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 834-56 (1991) (arguing that the distinction between *quid pro quo* and hostile environment harassment is more like a continuum than a divide and criticizing the rationale for applying different liability standards to the two types of harassment cases).

23 *See e.g., Carrero v. New York City Housing Auth.*, 890 F.2d at 579 ("Hostile environment and *quid pro quo* harassment causes of action are not always clearly distinct and separate. The discrimination which gives rise to them is not neatly compartmentalized but . . . the two types of claims may be complementary to one another."); *Henson v. City of Dundee*, 682 F.2d at 908 n.18 ("On a practical level, of course, there are many cases that could be characterized interchangeably as condition of work or *quid pro quo* cases."); 8 F.E.P. Manual at 6682 ("Although 'quid pro quo' and 'hostile environment' harassment are theoretically distinct claims, the line between the two is not always clear and the two forms of harassment often occur together."). Many cases involving explicit or implicit *quid pro quo* allegations have been analyzed as hostile environment cases. *See e.g., Tomka v. Seiler Corp.*, 66 F.3d at 1304-05 (supervisor convened business dinner and implied that employees were required to attend, fostered alcohol consumption at the dinner, which led to sexual assault); *Martin v. Cavalier Hotel Corp.*, 48 F.3d at 1349 (supervisor coerced plaintiff to comply with his sexual demands by telling her she would otherwise lose her job).

24 While proof issues may be somewhat different in the two types of cases, once a hostile workplace is proved and the harasser's exercise of

For reasons similar to those that support liability for *quid pro quo* harassment, employers are generally liable for discrimination by a supervisor outside the context of sexual harassment. Courts have consistently applied Title VII's statutory scheme to ensure that employers, not victims of discrimination, bear the cost of remedying and eradicating employment discrimination.[25] Applying a different rule for sexual harassment would contravene Congress' intent to strike at the entire spectrum of disparate treatment of men and women in the workplace, including a discriminatorily abusive work environment. *Harris*, 510 U.S. at 21.

There is no reason consistent with the objectives underlying Title VII for affording less protection in hostile environment cases than in other employment discrimination cases. Sexual harassment is a severe and pervasive problem that takes an enormous toll on the lives of its victims in terms

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authority is shown to have furthered the harassment, there is no justification for imposing a lesser standard for employer liability than in a *quid pro quo* case. Where, as here, the court is satisfied that the supervisors' conduct "unreasonably interfered with [plaintiff's] work performance by promoting an environment where female [employees] were considered fair game for uninvited touching and offensive remarks," and where, as here, the court finds conduct "sufficiently severe or pervasive to alter conditions" of employment and create "an abusive working environment," *Faragher*, 864 F. Supp. at 1562-63, the employer should bear the same liability for a supervisor's wrongful exercise of authority as in a *quid pro quo* case.

25 *See, e.g., Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 751-52 (3d Cir. 1990) (holding employer liable for conduct of supervisor who used his authority to create discriminatory conditions that caused plaintiff to resign); *North v. Madison Area Ass'n for Retarded Citizens*, 844 F.2d 401, 407 (7th Cir. 1988) (holding employer liable in Title VII wrongful discharge claim based on discriminatory conduct of supervisor).

of their economic, mental and physical well-being.[26] Although proof of psychological or physical injury is not required to establish a hostile environment claim, *Harris*, 510 U.S. at 22, sexual harassment in fact inflicts significant harm on victims. Studies estimate that over 90% of women who are sexually harassed suffer some emotional or psychological effects, including anxiety, depression, headaches, sleep disorders, gastrointestinal problems, nausea, lowered self esteem and sexual dysfunction.[27] Many suffer from post-traumatic stress disorder.[28] These psychological effects frequently affect work performance, job satisfaction, absenteeism, concentration, and ambition, and often lead to negative performance appraisals. Harassment frequently causes social isolation at work, including loss of informal associations with co-workers and supervisors, lack of feedback and support, and loss of information networks.[29]

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26 *See generally* Dolkart, *supra* note 14 at 186-88, 223-41.

27 Peggy Crull, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women* (1979); Louise F. Fitzgerald, *Violence Against Women in the Workplace*, Am. Psychologist 1070, 1072 (Oct. 1993); Jean A. Hamilton, *et al.*, *The Emotional Consequences of Gender-Based Abuse in the Workplace: New Counseling Programs for Sex Discrimination*, 6 Women and Therapy 155, 160 (1987); Jennifer C. Vinciguerra, *The Present State of Sexual Harassment Law: Perpetuating Post-Traumatic Stress Disorder in Sexually Harassed Women*, 42 Clev. St. L. Rev. 301, 315 (1994).

28 Fitzgerald, *supra* note 27, at 1072; Hamilton, *et al.*, *supra* note 27, at 164; Vinciguerra, *supra* note 27, at 303.

29 Gutek, *supra* note 14, at 349; Barbara A. Gutek and Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping With Sexual Harassment*, 42 J. Vocational Behav. 28, 33 (1993); Hamilton, *et al.*, *supra* note 27, at 164-69.

While it can be difficult to measure the economic losses due to sexual harassment, a Merit Systems Protection Board (MSPB) study of federal government employees found that those who were harassed lost $4.4 million in wages and 973,000 hours in unpaid leave annually.[30] Many employees who are harassed simply leave their job or request a transfer rather than endure the harassment. One study found that 42% of the victims of sexual harassment left their jobs and another 24% were fired.[31] The costs of leaving a job can be measured not only in the loss of income and seniority but in a disrupted work history, problems obtaining references for future jobs, loss of confidence and career advancement.[32] According to the MSPB, the United States government loses an estimated $327 million in two years in lost productivity and turnover as a result of sexual harassment.[33]

Title VII evinces Congress' intent that the employer, not the innocent employee, should bear these costs. Unless employers are held responsible for the acts of their agents, women will bear almost all the risk associated with sexual harassment, further exacerbating gender inequality in the workplace.

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30 U.S. Merit Systems Protections Board, *Sexual Harassment in the Federal Workplace* 26 (1995).

31 Crull, *supra* note 27 at 81; *see also* Frances S. Cole, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 Sex Roles 81, 89 (1986); Gutek & Koss, *supra* note 29, at 31.

32 Jean A. Hamilton, *Emotional Consequences of Victimization and Discrimination in Special Populations of Women*, 12 Psychiatric Clinic N. Am. 35, 161 (1989).

33 U.S. Merit Systems Protection Board, *supra* note 30, at 26.

III. EMPLOYERS SHOULD BE LIABLE WHEN THEY FAIL TO PROVIDE A MEANINGFUL AVENUE FOR COMPLAINTS OF SEXUAL HARASSMENT

A. Title VII Mandates Holding An Employer Liable For Failure To Provide A Meaningful Prevention Program And Redress Procedure

Whether or not the harasser acts as the employer's agent, the employer should be liable where it knew or should have known of the harassment but failed to take appropriate action to stop the harassment.[34] Because of the pervasiveness of sexual harassment in the workplace, an employer that failed to put in place an effective and meaningful procedure for handling employee complaints should have known of any sexual harassment that occurs, and is thus liable for failing to take appropriate action to end it.

This rule is consistent with the position the EEOC has taken: "The Commission generally will find an employer liable for 'hostile environment' sexual harassment by a supervisor when the employer failed to establish an explicit policy against sexual harassment and did not have a reasonably available avenue by which victims of sexual harassment could complain to someone with authority to investigate and remedy the problem." EEOC Policy

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34 Courts in the wake of *Meritor* have held that a plaintiff can demonstrate that her employer had "constructive notice" of the harassment "by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Waltman v. International Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989) (*quoting Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982)).

Guidance on Sexual Harassment, 8 F.E.P. Manual (BNA) at 405:6697.

An employer that fails to establish a meaningful policy should have known of any sexual harassment occurring in its workplace because workplace sexual harassment is so pervasive and so well-documented that employers may not claim that they could not anticipate it. Unfortunately, sexual harassment is foreseeable in virtually all workplaces. Studies show that between 40 and 90 percent of women in the United States workforce have been the victims of some form of sexual harassment on the job.[35] The extent of this problem is well known both in society at large and in the legal community. As Ninth Circuit Judge Alex Kozinski recently wrote: "'It is a sobering revelation that every woman -- *every* woman -- who has spent substantial time in the work force in the last two decades can tell at least one story about being the object of sexual harassment.'"[36] Not surprisingly, the number of EEOC complaints alleging sexual harassment has risen dramatically. In 1997, the EEOC

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35 *See, e.g.*, David Oppenheimer, *Exacerbating the* Exasperating, *supra* note 18, at 91. *See also* Gutek, *supra* note 14, at 46 (survey showed 53.1% of women had experienced sexual harassment); U. S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace – Is it a Problem?* (1981) (survey of 23,000 federal employees found 42% of women reported experiencing sexual harassment); U. S. Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* (1988) (survey update reported no significant change); Working Women's Institute, *Sexual Harassment on the Job: Result of a Preliminary Survey*, Research Series Report No. 1 (1975) (70% of women responding said they had been sexually harassed).

36 Alex Kozinski, *Foreword* to Barbara Lindemann & David D. Kadue, *Sexual Harassment in Employment Law*, at v (1992), *quoted in* Oppenheimer, *Exacerbating the Exasperating*, *supra* note 18, at 91-92.

received 15,889 complaints of sexual harassment, up from 5,623 in 1989.[37]

Any employer that failed to establish and implement a sexual harassment policy and procedures for reporting it should therefore be unable to claim ignorance of sexual harassment in the workplace. Hence, an employer that lacks a policy against sexual harassment and a meaningful avenue of redress is liable because it has failed to take reasonable action to discover the harassment so that it could then take appropriate action to end it. Employers may not hide their heads in the sand to escape responsibility for sexual harassment in the workplace.

In addition to creating constructive notice of harassment, failure to adopt a sexual harassment policy and to provide a reasonable avenue of complaint also gives rise to employer liability because it conveys to employees the apparent authority to harass. As the Tenth Circuit observed, when an employer has no written grievance policy and procedure, "'a victim of sexual harassment will reasonably perceive her only available options to be silently acquiescing in the harassment or leaving her job.'"[38] The EEOC adopted this position in its most recent Policy Guidance: "The Commission believes that in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint

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37 EEOC Sexual Harassment Statistics FY 1991-FY 1997.

38 *Harrison v. Eddy Potash, Inc.*, 112 F.3d at 1444 (*quoting* Staszewski, *Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 48 Vand. L. Rev. 1057, 1090 (May 1995)).

procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management."[39]

Holding employers liable for sexual harassment when they fail to promulgate effective policies and procedures for addressing it creates appropriate incentives for employers to adopt such policies, consistent with Title VII's objective of deterring unlawful discrimination. An employer that has an effective, widely publicized program to prevent and remedy sexual harassment, is likely to have fewer incidents of harassment. Therefore, requiring employers to institute prevention regimes would help them minimize their own liability. Managers are often uncomfortable dealing with sensitive issues in the absence of a policy requiring them to do so.[40] Companies that have implemented sexual harassment training programs have been less likely to see claims develop into lawsuits.[41] The evidence also shows that policies and training programs work to discourage actionable behavior. Prevention programs, including well-communicated policies and effective training programs, are

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39 8 F. E. P. Manual at 6697.

40 B. A. Gutek and M. P. Koss, *Sexual Harassment in the Workplace and Academia* 52 (Diane K. Shrier, ed. 1996) ("It must be recognized that harassment charges are embarrassing to institutions, and administrators may wish to suppress reports even though such suppression potentially places institutions in greater jeopardy than a direct response to complaints.").

41 *See Crackdown on Sexual Harassment*, 6 C.Q. Researcher 625, 633-34 (July 19, 1996) (in survey of 456 mid-size and large companies, 8% of companies with sexual harassment training programs were sued, as opposed to 12% of those without such programs).

the single most important and effective solution to reducing sexual harassment at work.[42]

B. The Existence Of A Policy Prohibiting, And Procedures For Reporting, Sexual Harassment Alone Should Not Immunize An Employer Where Agency Principles Still Mandate A Finding Of Liability

The adoption and distribution of a sexual harassment policy and procedures for reporting it, however, should not immunize an employer from liability where agency principles support holding the employer liable.[43] Independent agency principles mandate a finding of liability where the harasser acts as an agent of the employer, or where the employer otherwise had notice of the harassment but failed to respond appropriately, even where the employer has a policy against harassment. For instance, as discussed above, Section 219(2)(d) of the Restatement makes employees liable for harassment where a supervisor is aided in accomplishing the harassment by the use of delegated authority. In addition, Section 219(1) of the Restatement makes employers liable for harassment by their agents when the agent acted within

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42 *See* J. I. Avner, *Sexual Harassment: Building a Consensus for Change*, Kan. J. L. & Pub. Pol. 57, 74 (1994); E. J. Wagner, *Sexual Harassment in the Workplace* 110, 119 (1983); *see also Panelists Say Education is Essential to Effective Harassment Prevention Policy*, 66 U.S.L.W. 2271 (Nov. 4, 1997).

43 It is quite clear that simply having a policy against discrimination, or a procedure for handling employee complaints that is unavailable or unenforced, is not sufficient. This Court squarely rejected the employer's argument in *Meritor* that because it had a grievance procedure and policy against sexual harassment, and had received no notice of the workplace problem, it should be insulated from liability. *Meritor*, 477 U.S. at 72.

the scope of his employment.[44] Other courts have properly held employers liable for hostile environment harassment where the employer had actual or constructive notice of the harassment, but failed to take proper remedial action, under Section 219(2)(b) of the Restatement.[45] A rule that immunizes employers from liability based on the mere existence of a sexual harassment policy, regardless of whether the harasser acted as an agent of the employer or whether the employer failed to respond despite notice of the harassment, would undercut the independent agency principles that both this Court and the EEOC have made clear should inform decisions regarding employer liability.

Furthermore, there are compelling policy reasons why the existence of an anti-harassment policy and a reporting procedure alone should not immunize the employer from liability. First, the liability standards should take into account the reluctance of victims to report sexual harassment, particularly where the harasser has authority over the victim. Most studies conclude that victims of sexual harassment who

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44 *See Restatement (Second) of Agency* § 219(1); *see also Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 183-84 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992). We see no merit to the interpretation of some courts that because employers generally do not intend or authorize a supervisor to harass his subordinates, supervisors who do so are acting outside the scope of their employment. *See, e.g., Gary v. Long*, 59 F.3d 1391, 1397-98 (D.C. Cir. 1995). If that were the law, it is difficult to see how any negligent or illegal activity by employees could ever be imputed to employers, because employers surely generally do not authorize unlawful behavior.

45 *See Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 199 (5th Cir. 1992); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 (8th Cir. 1994); *Lipsett v. University of P.R*, 864 F.2d 881, 901 (1st Cir. 1989); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994).

take immediate action and complain, are "the exception, not the norm."[46]

Indeed, most women endure sexual harassment rather than confront it and risk the economic and emotional peril of unemployment. "Real victims rarely tell the harasser to stop. They are often inhibited or constrained from doing so by the situation (*e.g.*, their supervisor is the harasser), or by their upbringing . . . ."[47] It has been estimated that 50% of women who experience sexual harassment each year try to ignore it or simply endure it.[48] A review of ten studies reported that only 10% to 15% of women either responded assertively to or reported their harasser; less than 10% of women in public sector jobs, manufacturing or higher education reported harassment.[49]

The reluctance of most sexual harassment victims to take a stand against their harasser's abuse is grounded in fear

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46 National Council for Research on Women, *Sexual Harassment: Research & Resources* 32 (1995).

47 Barbara Gutek, *Responses to Sexual Harassment*, in *Gender Issues in Contemporary Society* 197, 205 (Stuart Oskamp & Mark Costanzo, eds. 1993).

48 Freada Klein & Mary Rowe, *Estimating the Cost of Sexual Harassment to the Fortune 500 Service and Manufacturing Firms*, in Testimony on H.R. 1 Before the House of Representatives Committee on Education and Labor, 102d Cong., 1st Sess. 169, 209 (1991).

49 J.E. Gruber, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 Basic and Applied Social Psychology 4, at 544-45 (1995). *See also* United States Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update*, *supra*, at 23-24 (noting that the most prevalent response for female victims was to tolerate the harasser's behavior silently).

of both retaliation and loss of privacy.[50] One study reported that 95% of women who report sexual harassment express such fears.[51] The fact is, moreover, that "[s]taggering numbers of women are forced by economic reality" to put up with their harassers, upon whom they depend for their "livelihoods, their psychological well-being and self-esteem. . . ."[52]

Requiring an employer to take meaningful action to monitor and prevent sexual harassment in the workplace is necessary to ensure the fulfillment of Title VII's policy objectives. It also behooves the employer to do more than merely institute and distribute an anti-harassment policy. "Companies have available a variety of measures . . . through which they can both monitor and impact behavior patterns in the workplace. The costs of preventing future harassment essentially represent an investment in long-term freedom from liability." *Jansen*, 123 F.3d at 499 (Flaum, J., concurring).

In sum, the publication and enforcement of a policy against sexual harassment is necessary to prevent harassment but should not immunize an employer from liability for harassment that has already occurred. All employer actions, including establishing a policy against and procedure to

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50 Testimony on H.R. 1, *supra* at 172.

51 R. Sandroff, *Sexual Harassment in the Fortune 500*, *supra* note 13, at 71.

52 *Research & Resources*, *supra* note 46, at 34; *see also Nichols v. Frank*, 42 F.3d at 510 ("For economic reasons, most workers cannot simply abandon their employment -- new jobs are hard to find").

report sexual harassment, must meaningfully take into account the realities of the workplace, so that employers have incentive to minimize the incidence of harassment, and sexual harassment victims receive the full protection of the law. Finally, even if the employer has a meaningful policy and procedure, Title VII still mandates holding an employer liable where agency principles otherwise require it. Title VII's purpose of preventing and remedying discrimination will thus be effectuated.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeals for the Eleventh Circuit and remand for entry of judgment for petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX

The *National Women's Law Center* ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has worked continuously to make Title VII's promise of equality in the workplace a reality. The existence of widespread sexual harassment in employment greatly restricts the opportunity for women to participate as full partners in the workplace. The Center has a deep and abiding interest in ensuring that Title VII adequately protects women from sexual harassment in employment.

Equal Rights Advocates ("ERA") has dedicated itself for the past 23 years to achieving equality for women and girls. It has an abiding interest in ensuring the sound interpretation and application of Title VII of the Civil Rights Act of 1964, which protects against sexual harassment in the workplace. ERA has represented plaintiffs in numerous sexual harassment cases, including the first case in the Ninth Circuit to find sexual harassment a violation of Title VII, *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). In addition, ERA educates hundreds of women each year through its advice and counseling line regarding their legal right to be free from sexual harassment, conducts sexual harassment workshops for schools and non-profit organizations, and provides technical assistance to attorneys who are handling sexual harassment cases, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 1994 WL 792661 (M.D. Tenn. 1994); *Murillo v. Rite Stuf Foods, Inc.*, (Cal. App. Ct. 1997); *Rojo v.*

Kliger, 52 Cal.3d 65 (1990); *Dyna-Med v. Fair Employment & Housing Comm.*, 43 Cal.3d 1379 (1987) and *Commodore Home Systems, Inc. v. Superior Court*, 32 Cal.3d 211 (1982). In 1996, it authored an *amicus* brief in a California case, *Lai v. Prudential Insurance*, which examined the definition of supervisor for liability purposes under California's anti-discrimination statute.

The *Women's Legal Defense Fund* ("WLDF") is a non-profit, national advocacy organization founded in 1971 to advance the rights of women. WLDF promotes fairness in the workplace, quality health care, and policies that help women and men meet both work and family responsibilities. WLDF volunteer lawyers represented the plaintiff in *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), one of the first federal appellate holdings that sexual harassment may violate Title VII of the 1964 Civil Rights Act, and have participated as *amicus curiae* in every sexual harassment case that has come before the Supreme Court of the United States.